ORIGINAL

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Petitioner-Defendant
(in Pro Se)

UNITED STATES DISTRICT COURT

DISTRICT OF HAWAII

UNITED STATES OF AMERICA, Plaintiff-Respondant, v. Rick Vo, Petitioner-Defendant,	Civil No. 07-00052 ACK Case No. 02-00411 ACK MEMORANDUM OF LAW IN SUPPORT OF MOTION UNDER 28 U.S.C. §2255 TO VACATE, SET ASIDE OR CORRECT SENTENCE

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INTRODUCTION

Vo raises one (1) ground for relief: Denial of Effective Assistance of Counsel Due to Counsel's Failure to Request a Mistrial Based on Jury Intimidation of Tampering.

Vo specifically alleges that an incident of jury intimidation or tampering occurred during his trial, which raised a presumption of prejudice under Supreme Court and the Ninth Circuit precedent. Vo's trial counsel, Michael Weight, was appraised of this incident; but, due to lack of awareness of the case law in this area, he failed to request a mistrial and/or evidentiary hearing on the matter as the case law above required. Had counsel done the former and/or latter, a mistrial would have been declared as the government did not - and could not - overcome the presumption of prejudice from the incident of jury intimidation or tampering.

These allegations, if true, would be sufficient to establish that counsel's performance was deficient and that Vo was prejudiced thereby. As this establishes a claim of Ineffective Assistance of Counsel under Strickland v. Washington 466 U.S. 668 (1984), Vo argues he is therefore entitled to an evidentiary hearing so that he can establish this claim.

FACTS

The government arrested Vo together with his wife, Brenda Vo ("Brenda"), on October 6, 2002. Three days later, the government indicted the Vos in two joint counts to possess over fifty grams of methamphetamine with intent to distribute and with aiding and abetting each other in the possession of over fifty grams of

methamphetamine with intent to distribute. The above charges stemmed from Brenda'a arrest in connection with her having mailed a box containing methamphetamine from a Mail Boxes Etc. in Hawaii to the Vo's residence in Playa del Rey, California in October of 2002.

Brenda pled guilty to the conspiracy charge on April 17, 2003; in exchange, the government moved to dismiss the aiding and abetting count against her. After her plea, the government filed a superceding indictment, which expressly noted that Brenda was not a defendant.

The superceding indictment essentially replicated the original conspiracy count, accusing Vo, in count 1, of conspiracy, from about June, 2001 to about October 6, 2002, with Brenda and unnamed others to distribute and possess with the intent to distribute over fifty grams of methamphetamine in violation of 21 U.S.C. §841 (a)(1). Similarly, count 2 of the superceding indictment replicated the original aiding and abetting charge, accusing Vo of aiding and abetting Brenda on or about October 4, 2002, in the possession with the intent to distribute over fifty grams (to wit, approximately fourteen pounds) of methamphetamine in violation of U.S.C. §2 and 21 U.S.C. §841 (a)(1).

On May 14, 2003, Vo's trial began. On the second day of the trial, after the jury had been selected (but out of their presence during a recess) the court informed Vo's counsel, Michael Weight, and the Assistant United States Attorney, Tom Muehleck ("AUSA Muehleck"), that it received a report from juror number three (3), Mr. Hanki ("Mr. Hanki"), that he heard someone in the court cafeteria, whom he thought might have been a DEA

witness, saying that one of the jurors was "frowning" (Exhibit "A") (Declaration of Rick Vo in support of §2255 Motion) ("Vo's Decl"). ¶ 2 [1]

The court noted that the circumstances surrounding this incident was not "that clear," (Id.), and asked both Mr. Weight and AUSA Muehleck whether they "want(ed) to do anything more about this." (Id.). Mr. Weight responded that he thought "all that would do would be to emphasize the matter," and that he thought "it's better left alone." (Id.). Mr. Weight did not know at that time the above incident involving Mr. Hanki had raised a presumption of prejudice under Supreme Court and Ninth Circuit precedent and that it was grounds for a mistrial. (Id. at ¶ 3).

AUSA Muehleck did not directly respond to the court's question above. Rather, as to the question of whether the person that Mr. Hanki overheard in the federal court cafeteria was in fact a DEA witness, he "object(ed) to that on the record without more information." (Id. ¶ 2). The court concluded the discussion by saying "the juror [(Mr. Hanki)] thought it was a DEA witness, but he wasn't sure. He didn't have a precise recollection." (Id.).

Thereafter, Vo's trial immediately resumed. (Id.) No further discussion of Mr. Hanki or the incident above arose and no one ever questioned Mr. Hanki or any other jurors about the matter during Vo's trial. (Id. at ¶ 4). The jury ultimately

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1/ Attached to Vo's Decl. as "Exhibit A" is a true and correct copy of excerpts of Vo's trial transcripts.

found Vo guilty of aiding and abetting Brenda Vo as charged in count 2 of the superceding indictment. The jury failed to return a verdict on the alleged conspiracy charged in count 1.

On December 15, 2003, the District Court sentenced Vo to 262-months imprisonment and a ten-year term of supervised release. Vo's appeal to the Ninth Circuit was denied on June 27, 2005. See U.S. v. Vo, 413 F.3d 1010 (Ninth Circuit 2005). His petition for writ of certiorari was likewise denied by the Supreme Court on November 28, 2005.

ARGUMENT

I. THE GOVERNING LAW

A. 28 U.S.C. § 2255

1. Standard for Review

28 U.S.C. § 2255 provides:

> "A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence imposed in violation of the Constitution or Laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed sentence to vacate, set aside or correct the sentence."

2. Evidentiary Hearing

An inmate filing a claim for relief under section § 2255 is entitled to an evidentiary hearing "unless the motion and the files and the records of the case conclusively show that the prisoner is entitled no relief." U.S. Leonti, 326 F.3d 1111, 1116 (9th Cir. 2003).

The Ninth Circuit has characterized this standard as requiring an evidentiary hearing where "the movant has made

specific allegations, if true, state a claim in which relief could be granted." Id. This standard specifically "entails assuming the truth of [the movant's] factual allegations." Id. at 1121.

3. Timeliness

A prisoner has one year from "the date on which the judgement of conviction becomes final" to file § 2255 motion. 28 U.S.C. § 2255 ¶ (b)(1). The present petition is timely as Defendant's conviction became final on November 10, 2005 when the Supreme Court denied his Petition for Writ of Certiorari.

B. INEFFECTIVE ASSISTANCE OF COUNSEL

It is well settled that the Sixth Amendment guarantees criminal defendant's the right to effective assistance of counsel. Strickland, supra.

To prevail on such a claim under Strickland, a petitioner must establish (a) that his counsel's representation was outside the wide range of professional competent assistance, and (b) that he was prejudiced by reason of his counsel's representation. Id. 1t 668. An attorney's performance is deficient if it falls below an "objective standard of reasonableness." Id. See also Leonti; 326 F.3d at 1120.

The concept of ineffective assistance of counsel applies in the context of counsel's handling of jury matters. See Fields v. Woodford, 281 F.3d 963, 977-73 (9th Cir, 2002)(citing cases); Government of Virgin Islands v. Weatherwas 20 F.3d 572 (3rd Cir, 1994); Davidson v. U.S, 951 F.Supp. 555 (W.D. Pa. 1996).

II. VO WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL DUE TO COUNSEL'S FAILURE TO REQUEST A MISTRIAL BASED ON JURY INTIMIDATION OR TAMPERING.

The questions posed in the present § 2255 motion are (1)

whether there was in fact an instance of jury intimidation or tampering during Vo's trial; (2) if so, whether Vo's counsel was deficient in failing to raise the issue by requesting a mistrial and/or, at minimum, an evidentiary on the issue; and (3) whether Vo was prejudiced as a result. Vo will discuss each of these issues in turn below.

A. Jury Intimidation or Tampering

The Sixth Amendment guarantees criminal defendants a verdict by impartial and indifferent jurors. U.S. v. Rutherford, 371 F.3d, 634, 641 (9th Cir, 2004). To protect this right, in Mattox v. U.S., 146 U.S. 150, 151, 13 S. Ct. 50, 36 L. Ed. 917 (1892), the Supreme Court held that "[p]rivate communications, possibly prejudicial, between jurors and third parties or the officer in charge, are absolutely forbidden and invalidate the verdict, at least unless their harmlessness is made to appear." See also Rutherford, Id.

Subsequently, in Remmer v. U.S., 347 U.S. 227, 74 S. Ct. 450, 98 L. Ed. 654 (1954)("Remmer I"), the court established that any "private communication, contact or tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury" is deemed "presumptively prejudicial" and placed a heavy burden on the government to rebut the presumption by proving that the error was harmless beyond a reasonable doubt. Id. at 229, 74 S. Ct. 450. See also Rutherford, Id. In Rutherford, the Ninth Circuit stated:

> "The importance of the application of the presumption cannot be overstated, where a juror is improperly contacted during a trial, the potential for prejudice is significant, but it is often very difficult for the defendant to

prove."

Id. at 641 (citation omitted).

In Remmer v. U.S., 350 U.S. 377, 382, 76 S. Ct. 425, 100 L.Ed. 435 (1956) ("Remmer II"), the court suggested that only "unathorized intrusions" into the "sanctity of the jury's right to operate as freely as possible" purposefully made might trigger the presumption of prejudice. Id. at 382, 76 S. Ct. 425. Rutherford, Id. Shortly thereafter, however, in a case in which intent was admittedly lacking the court clarified the issue holding that, under Remmer II, the "fact that the intrusion was unintentional does not remove the effect of the intrusion." Gold v. U.S., 352 U.S. 985, 77 S. Ct. 378, 1 L.Ed. 2nd 360 (1957) (per curiam) (emphasis added).

The Ninth Circuit has applied the Mattox/Remmer rule in a number of cases and, in line with Gold, have consistently stated that the appropriate inquiry is whether the unauthorized conduct or contact is "potentially prejudicial" not whether the parties alleged to have tampered with the jury did so intentionally. See Rutherford, 371 F.3d at 642 (citing cases). See also U.S. v. Elias, 269 F.3d, 1003, 1020 (9th Cir. 2001)(noting that courts look not to the "intent of the individual alleged to have tampered with the jury," but rather to "the jurors' perceptions of the conduct at issue.").

In short, in cases in which the circumstances suggest that the improper communication or contact is "sufficiently serious" that it might prejudice the jurors, the Ninth Circuit has afforded the presumption of prejudice; in the case of other more "prosaic kinds of jury misconduct," or "where the improper

contact with jurors has been de minimis," the court has not. Rutherford, 371 F.3d at 643. See id. (citing cases discussing the difference). See also, Caliendo v. Warden of California Mens Colony, 353 F.3d, 1147, 1151-52 (9th Cir. 2004). In the latter circumstances, "courts have departed from Mattox and placed the burden on the defendant to establish prejudice." Id. See also U.S. v. Brande, 329 F.3d 1137, 1176077 (9th Cir. 2003) (same).

The case law above compels the conclusion that the improper contact involving Mr. Hanki in this case was "sufficiently serious" and thus raised a "presumption of prejudice" and required that an evidentiary hearing be held on the matter. Rutherford and Brande are particularly instructive here.

In Rutherford, for example, the defendant obtained post trial affadavits from various jurors pertaining to events that occurred during the trial. Therein, one juror stated:

> "[D]iscussion as to possible retaliation against jurors by certain IRS auditors resulted because there were a number of IRS employees who attended the trial were present every day, **and every time I looked at them they seemed to be glaring at the jury.** This was very unsettling to some of (sic) the jurors."

Rutherford, 371 F.3d at 638 (emphasis added).

Based on these affadavits, the defendant in Rutherford filed a "rule 33" motion for a new trial wherein he argued that he was entitled to this relief under the Mattox/Remmer line of cases. Id. at 639. The district court held a hearing on the issue. Id. The district court struck portions of the jurors' affadavits on the basis that much of the statements therein were inadmissible under "Fed. R.Evid. 606(b)" as constituting evidence of the jurors' "mental processes" concerning "the verdict." Id.

The only statement that the court found that could provide the basis for a Mattox/Remmer claim was the juror's "statement regarding the presence of so many 'glaring' IRS agents in the courtroom." Id.

The district court ultimately ruled, however, that because the defendant could not prove that the "glaring" agents "intended to intimidate or influence the jurors," the agents' conduct had to be "considered as a more prosaic form of contact with the jurors" and that the defendants thus had the burden of proving actual prejudice. Id. Because the defendants could not meet this burden, the court denied their motion for a new trial. Id. The Ninth Circuit reversed and remanded for a further evidentiary hearing.

The Rutherford court first noted that the conduct at issue was that of "government agents," and that courts have emphasized that "judges should exercise additional caution when government employees are involved because of the heightened concern that the jurors will not 'feel free to exercise [their] functions' with the government looking over [their] shoulder[s].'" Id. at 643 (citation omitted). Indeed, the court noted that the Ninth Circuit has held "even seemingly innocuous juror conversation and contact between such individuals and a juror can trigger a presumption of prejudice." Id.

The court specifically ruled "that the district court erred in concluding the defendant must prove that the individual[ ] [FBI] agents involved **intended** to influence or prejudice the jurors in order for the presumption of prejudice to apply." Id. at 644 (emphasis added). The court stated that "[t]he

appropriate inquiry is whether the unauthorized conduct 'raises a risk of influencing the verdict,'...or had an adverse effect on the deliberations." Id. (citation omitted). But because the court also ruled that the district court had also "erred [under Fed. R.Evid. 606(b)] in limiting juror testimony at the evidentiary hearing to the existence of such conduct at the same time it occurred," and the record was thus "incomplete," it did not determine whether the presumption should apply and whether the jurors were adversely influenced by the agents' conduct at trial. Id.

Rather, the court left the latter task to the district court following the holding of a "further evidentiary hearing." The court expressed "no opinion as to the results on remand." Id. However, the court did state "that standing alone, the mere attendance of seven to 10 agents at trial is not grounds for applying the presumption of prejudice, or, for that matter, granting a new trial." Id. The court nevertheless concluded that "glaring and staring at jurors on a regular basis may be another matter." Id. (emphasis added).

In Brande, after the defendant had been found guilty, but before sentencing, he learned that during the course of the trial that a juror was overheard (by other members of the jury) saying "something to the effect of he was unable to find anyone guilty because of his religious beliefs.", 329 F.3d at 1175. Two jury members reported this to "either a clerk of the court or court intern," who "then approached that juror and asked him whether he would be unable to find a defendant guilty of a crime." Id. The juror in question responded that "he would not be unable to do

so." Id.

Five months after learning of the latter incident, counsel brought it to the court's attention and "suggested that the court hold an evidentiary hearing on the matter." Id. The court refused to hold a hearing on the basis that "the defense had waited so long before bringing the matter to its attention." Id. at 1176. The Ninth Circuit reversed and remanded with instructions that the district court hold an evidentiary hearing to determine whether "the contact between the juror and the court employee" required a new trial.

The Brande court noted the Ninth Circuit's rule that the "more prosaic kinds" of conduct did not raise a presumption of prejudice or require a hearing. The court then stated:

> "To determine whether an evidentiary hearing must be held, [under Remmer I], th court must consider the content of the allegations, the seriousness of the alleged misconduct or bias and the credibility of the source...If these factors warrant holding a hearing, a hearing should be held unless the court already knows 'the exact scope and nature' of the improper contact."

Id. at 1176-77 (citations omitted) (emphasis added).

The "credibility" of the allegations in Brande were "not in doubt, only their seriousness." Id. Three factors lead the court to conclude that the allegations were "serious enough" to raise a presumption of prejudice under Remmer I, and thus "warrant a hearing":

> "First, the conduct was between a juror and court personnel. The defendants are correct that juror is more susceptible to improper influence from a court officer than from spectators or parties to the case. See Parker v. Gladden, 385 U.S. 363, 365, 87 S. Ct. 468 L.ED. 2d 420 (1996) (percuriam). Second, the communication concerned the central duty of a juror-deciding guilt - and may have had the effect, intended

> or not, of influencing the juror's exercise of that duty. See United States v. Plunk, 153 F.3d 1011, 1023 (9th Cir. 1988) (distinguishing "Substantive contact" from contact related to providing for physical need of jurors). Third, because the ex parte contact came to light only after the verdict, there was no opportunity for a curative instruction, 197 F.3d at 981 (9th Cir. 1999) (citing adequate curative instruction in finding the jury not tainted); United States v. English, 25 C.C.P.A. 770, 92 F.3d 909, 914 (9th Cir. 1996) (same).
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> "The government may turn out to be correct that the communication was not prejudicial. In this instance, however, it is impossible to know whether there was prejudice without an evidentiary hearing."

Id. (citation omitted) (emphasis added).

Turning to the present case, as in Brande, the "contact" and "credibility" of the allegations of improper contact here are not (and cannot be) "in doubt, only their seriousness.[3] Id. at 1176-77. Three specific factors compel the conclusion that the improper conduct here was "sufficiently serious" to raise a 'presumption of prejudice.'"

First, the conduct at issue was that of "government agents."[4] This, as noted, was a significant factor in both Brande and Rutherford, which lead the court to conclude that further inquiry was necessary. See id. at 643 ([E]ven seemingly innocuous juror conversations and contact between [government agents] and a juror can trigger a presumption of prejudice").

3/ Indeed, the juror at issue in this case, Mr. Hanki himself brought the improper contact to the court's attention.

4/ Any argument that the government may make as to the record not clearly showing that it was in fact a government agent/witness that Mr. Hanki overheard (as it indicated it would during Vo's trial (TT April 20, 2005 p. 3-6)) would be misplaced, as the Ninth Circuit has made it clear that it is the "jurors' perception" that matters.

Second, there was "no...curative instructions" given in this case that could have neutralized any potential harm. This was another factor that lead the court in Brande to find that the allegations were serious enough in that case to require a hearing. Id. at 1177. Third, and perhaps most important, there can be no question that the improper contact in this case "disturbed" Mr. Hanki and caused him concern, which is obvious from the fact he brought it to the court's attention in the first instance. The Supreme Court found this to be a significant factor in Remmer II. See id. at 427:

> "Smith [(the juror in question)] was disturbed. As he later testified, "I always felt whether Mr. Satterly said it [(i.e. offered a bribe)] in so many words or not, I always felt that money was involved; otherwise why would any question be put to me." **So disturbed was Smith that he told the trial judge about it."**

Id. (emphasis added).

Moreover, the improper contact at issue (at least arguably) "directly concerned the trial." To be sure the record indicates that the alleged government agent witness in question was informing another agent or some other court personnel [5] that a juror was "frowning" during the course of the trial as evidence and/or arguments were being presented. Cf. Brande, 329 F.3d at 1177; Caliendo, 353 F.3d at 1153.

But regardless, the misconduct here - like the juror misconduct in Caliendo - went beyond "a mere inadvertent or accidental contact involving only an exchange of greeting in order to avoid an appearance of discourtesy." Id. (citation

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5/ The federal "court cafeteria" is of course not open to the general public.

omitted). See also U.S. v. Angulia, 4 F.3d 843, 847 (9th Cir. 1993) (citing cases where the alleged misconduct was not considered serious enough to warrant a hearing which are clearly distinguishable from the case at bar).

Indeed, the misconduct here very well may have "prevented [Mr. Hanki] from thinking about the evidence or paying attention to the judge's instructions, "Rutherford, 371 F.3d at 642, in that it could have caused him to be more concerned with his facial expressions and not drawing obviously unwanted attention, thereby, from government agents/witnesses - who had (intentionally or unintentionally) made it clear to him that they were watching for this. See id. ("Jurors must feel free to exercise [their] functions 'with[out] the government looking over [their] shoulder[s].'". (Quoting Remmer I, 347 U.S. at 229.) In short, the government agents' conduct at issue here was certainly more serious than the "glaring" in Rutherford, which in itself caused the Ninth Circuit to remand, as they affirmatively informed Mr. Hanki they would be "looking" for adverse juror signs.

Accordingly, Vo has met his burden of showing that the misconduct here was "sufficiently serious" to raise a "possibility of prejudice." Therefore, as the record shows that the district court made no attempt to determine the "exact scope and nature" of the "improper contact," [6] a presumption of prejudice arose in this case requiring an evidentiary hearing. Brande, 329 F.3d at 1177.

6/ To be sure the trial transcript reveals that the court stated that the circumstances surrounding the incident "was not that clear." (TT April 20, 2005 p. 3-6).

B. Counsel's Performance Was Deficient

As noted, Vo has established that the improper juror contact in his case raised a presumption of prejudice under Mattox/Remmer which required an evidentiary hearing be held where the government would have the burden of rebutting this presumption to avoid the granting of a mistrial. Angulo, 4 F.3d at 846-47. The question here is thus whether Vo's counsel's performance was deficient in failing to request the latter. Two cases, Davidson and Weatherwax, are on point and compel the conclusion that this question must be answered in the affirmative.

In Davidson, for example, the defendant's counsel learned of an instance of "juror misconduct" [6], but failed to bring it to the court's attention or move for a mistrial at that point in the trial. Id. Counsel testified at an evidentiary hearing that he failed to do so "because in his opinion, the conduct of the jury did not constitute juror misconduct." Id.

In response to the defendant's claim of ineffective assistance of counsel in his § 2255 motion, the government did not contest the fact that "the juror engaged in premature deliberation," or that this "constituted juror misconduct sufficient to warrant declaring a mistrial." Id. (citation omitted). The government nevertheless contended that trial counsel's failure to bring the matter "to the court's attention" did not constitute deficient performance because trial counsel's failure "resulted from a reasonable trial strategy." Id. at 557-

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6/ The specific instance of misconduct was that a member of the jury had engaged in pre-mature deliberation and eleven of them "voted to find [the defendant] guilty. Id.

58. The district court rejected this argument for "two distinct reasons." Id.

The court first ruled that because counsel testified that he did know that the juror's actions constituted misconduct, his failure above resulted from a mistake or misunderstanding of the law - rather than a "strategic decision," and thus constituted deficient performance under Strickland, Davidson, 951 F.supp. at 558. This is consistent with the law in the Ninth Circuit. See e.g. Edwards v. LaMarque, 439 F.3d 504, 513 (9th Cir. 2005) (upholding the district court's finding that counsel's performance was deficient, where the record revealed that counsel's error resulted from a "mistake" rather than a "strategic choice"); U.S. v. Span, 75 F.3d 1383, 1390 (9th Cir. 1996) (Holding that "[c]ounsel's errors...were not a strategic decision. They were the result of a misunderstanding of the law," and were thus unreasonable, which amounted to deficient performance under Strickland.)

Secondly, the Davidson court ruled that "even assuming that the court could find some strategic motive underlying" counsel's failure as mentioned above, any such strategy was "unreasonable" under the circumstances and thus constituted deficient performance in any event. Id. In so ruling, the court noted the well established rule that "[r]easonable trial strategy must, by definition, be reasonable." Id. See also Span, 75 F.3d at 1390 (same).

In Weatherwax, counsel also failed to bring an instance of juror misconduct to the court's attention that occurred during the defendant's trial. The specific instance of misconduct

involved juror members reading a prejudicial newspaper article concerning the defendant's trial. Id. at 579. The court noted that "the uncontradicted affadavits, considered as true, reveal[ed] a disregard for the implications of the jurors' activities," and then specifically held thatcounsel's "failure to call the court's attention to the incident based upon indifference fell below the Strickland object standard of reasonableness. Id.

Here, when asked by the court whether he "want[ed] to do anything more about this," Mr. Weight's response was, "I think all that would do would be to emphasize the matter. I think it's better left alone." (TT April 20, 2005). As the improper contact involving Mr. Hanki in this case raised a "presumption of prejudice," the situation was very serious and, indeed, mandated a hearing under Mattox/Remmer. The record here thus reveals either a complete "disregard for the[se] implications" on Mr. Weight's part, and/or that he made a "mistake" or "misunderstood" (or was totally oblivious of) the law.

Indeed, the situation could not be "emphasized" more as the damage had already been done. Rather than a need to be "left alone" at the time, the law required - at minimum - that a "curative instruction" be given. Cf. Brande, 329 F.3d at 1177 (citing lack of "curative instruction" in finding that a Mattox/Remmer hearing was necessary); Caliendo, 353 F.3d at 1153-54 (Holding that the government rebutted the "presumption of prejudice", in large part because "the judge admonished the jurors not to allow the improper encounter to influence their judgement[,]... and [] all the jurors said that their judgement

would not be influenced by the encounter.").

Accordingly, under the cases cited above, Vo has met his burden of showing that Mr. Weight's failure to request a mistrial (and/or a Remmer hearing) in this case fell far "below the Strickland objective standard of reasonable." Weatherwax 20 F.3d at 579.

C. Vo Was Prejudiced by Counsel's Deficiencies

As noted, as the record here stands, "prejudice" must be "presumed." Therefore, if the facts herein are found to be true, Vo has made out a "prima facie" case of ineffective assistance of counsel under the Strickland standard. This entitles Vo to an evidentiary hearing so that he can establish this claim.[7] Cf. Fields, 281 F.3d at 977-78 (ruling that the success of the defendant's claim of ineffective assistance of counsel, as to counsel's handling of a juror misconduct/bias issue, depended on the success of the latter claim, which the court remanded for an evidentiary hearing.); Weatherwax, 20 F.3d at 581 (holding that

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7/ At the evidentiary hearing, the government will have the "heavy burden... to rebut the presumption [of prejudice] by proving that the error was harmless beyond a reasonable doubt," Remmer I 347 U.S. at 229, and/or it must show Mr. Weight's decision not to bring the jury misconduct issue to the court's attention (or request a mistrial) was (contrary to Vo's factual allegations) "the basis of "sound trial strategy." Weatherwax, 20 F.3d at 579-80. Of note, the Third Circuit later ruled, after the case had returned from the district court, after it remanded in the latter case, that the government had successfully established that counsel's performance was not deficient as counsel made a "reasonable tactical decision" to not raise the jury misconduct issue at trial. Government of Virgin Islands v. Weatherwax, 77 F.3d 1425, 1432 (3rd Cir. 1996) Counsel's specific explanation, which the court found reasonable, was that he did not bring the latter issue to the court's attention or request a mistrial because he had a "jury that left [him] very happy, with a very happy feeling." Id. at 1430.

defendant met his burden of establishing prejudice under Strickland where, due to counsel's deficient performance, a valid jury misconduct/bias claim in which "proof of actual prejudice is excused" (or it is"presumed") was not brought to the trial court's attention.)

CONCLUSION

For the foregoing reasons, Defendant Vo prays that the relief he requests herein will be granted.

Dated: 7-17-07

Respectfully Submitted,

Rick Vo
Petitioner/Defendant
(In Pro Se)